Post-it™ brand fax transmittal memo 7671 | # of pages ▸ 12

To TONY GALLEGOS	From SAL VENTICINQUE
Co. UDOGM	Co. BLM
Dept.	Phone # (801) 259-2141
Fax # (801) 359-3940	Fax # (801) 259-2158

United States D

OFFICE OF HEARINGS AND APPEALS
Interior Board of Land Appeals
4015 Wilson Boulevard
Arlington, Virginia 22203

IN REPLY REFER TO:

S/019/030

RONALD A. PENE

IBLA 93-229 Decided April 9, 1996

Appeal from a decision of the Area Manager, Grand Resource Area, Utah, Bureau of Land Management, notifying mining claimant of noncompliance and trespass on public lands within wilderness study area. UMC-277243, et al.

Affirmed in part, reversed in part.

1. Federal Land Policy and Management Act of 1976: Plan of Operations--Federal Land Policy and Management Act of 1976: Wilderness--Mining Claims: Plan of Operations--Wilderness Act

The owner of post-FLPMA mining claims situated within a wilderness study area is properly cited under 43 CFR 3802.4-1 for failing to comply with Departmental regulations where, without prior BLM approval of a plan of operations under 43 CFR 3802.1-1, he constructs new access roads and creates new sampling pits, where such activity causes impairment of the area's wilderness suitability. BLM may properly require the claimant to reclaim the affected land only to its condition prior to such activity.

APPEARANCES: Daniel B. Frank, Esq., and Karen Budd-Falen, Esq., Cheyenne, Wyoming, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Ronald A. Pene has appealed from a decision of the Area Manager, Grand Resource Area, Utah, Bureau of Land Management (BLM), dated October 5, 1992, notifying him that he was in noncompliance and trespass by virtue of unauthorized mining operations in connection with five unpatented placer mining claims, the Pussycat Nos. 1 through 3, 5, and 6 (UMC-277243 through UMC-277245, UMC-277247, and UMC-277248), on public lands within the Westwater Canyon Wilderness Study Area (WSA) (UT-060-118). 1/

1/ The Oct. 5, 1992, decision was the second decision mailed to Pene. An identical decision, dated Sept. 29, 1992, was mailed to a different post office box in Moab, Utah. The record contains certified return receipts signed by Pene evincing receipt of both decisions.

FAX TRANSMITTAL ATTN: TERRY MCBRAYER

135 IBLA 143

This case involves public land situated in secs. 22, 23, 26, and 27, T. 20 S., R. 25 E., Salt Lake Meridian, Grand County, Utah, straddling the Colorado River where it flows through Westwater Canyon. On November 3, 1980, the Utah State Director included all of these lands in the "Star-Marble Canyons" WSA (UT-060-118), pursuant to section 603(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782(a) (1988). 45 FR 75602, 75603 (Nov. 14, 1980). In October 1991, BLM identified a slightly smaller tract (still covering all of Pene's claims), under the same number, referring to it as the Westwater Canyon WSA. 2/

A WSA is a roadless area that has been identified as having wilderness characteristics and is being reviewed for possible designation as wilderness, pursuant to the Wilderness Act, as amended, 16 U.S.C. §§ 1131-1136 (1994). During the period of wilderness review, BLM is required by section 603(c) of FLPMA, 43 U.S.C. § 1782(c) (1988), to manage WSA's "in a manner so as not to impair the suitability of such areas for preservation as wilderness." The City of St. George, 116 IBLA 230, 231 (1990). To date, no action has been taken by Congress to designate the Westwater Canyon WSA as wilderness, so that the lands involved here remain subject to the section 603(c) nonimpairment mandate. See Virgil Schuetta, 131 IBLA 332, 335 (1994).

Pene located the claims on March 28, 1984, following WSA designation, and it is undisputed that they are situated entirely within the WSA. 3/ BLM's management of surface operations is accordingly governed by 43 CFR Subpart 3802. See Paul M. Stock, 126 IBLA 232, 236-37 (1993).

In June and July 1984, the Moab District Office conducted an evaluation of Pene's gold development work in the WSA under the nonimpairment standards and concluded that the activity up until that time was nonimpairing. His area of disturbance was then limited to about 50 x 50 feet. BLM noted in its July 11, 1984, evaluation of impact to wilderness values under the nonimpairment standards that, although his claims were substantially noticeable to whitewater rafters in the canyon, his activities on the claims were not noticeable within the unit as a whole. Further, reclamation was expected to be a naturally occurring process with Pene's casual use and his working becoming substantially unnoticeable in the area as a whole in time. Based on that determination, on July 23,

2/ The record contains references to the WSA as the "Westwater WSA" dating back to August 1984.

3/ The Pussycat Nos. 1-6 claims were located at a time when the withdrawal of the lands from mineral entry by the Wild and Scenic Rivers Act (WSRA), as amended, had lapsed.

The Pussycat No. 4 placer mining claim (UMC-277246) is not involved in the instant controversy.

In 1990, Pene located the Kelli Jo Nos. 1 through 22 lode mining claims (UMC-343404 through UMC-343425) with respect to the same placer land. They also are not involved here.

1986, BLM issued a decision record finding no impairment, but noting that BLM would monitor Pene's placer mining operation for continued compliance with the nonimpairment standard. BLM notified him of that determination by letter dated September 20, 1985, but expressly cautioned that a plan of operations was required 30 days prior to commencing any of the following work within lands under wilderness review:

> 1. Any mining operations which involve construction of means of access, including bridges, land areas for aircraft, or improving or maintaining such access facilities in a way that alters the alignment, width, gradient size, or character of such facilities;
>
> * * * * * * *
>
> 3. Mining operations using tracked vehicles or mechanized earth moving equipment, such as bulldozers or backhoes;
>
> 4. Any operations using motorized vehicles over other than "open use areas and trails" as defined in Subpart [8340] of this title, off-road vehicles, unless the use of a motorized vehicle can be covered by a temporary use permit issued under Subpart 8372 of this title. [Emphasis in original.]

On April 15, 1986, BLM's Area Manager wrote Pene advising that, if he planned to conduct assessment work on the claims, a plan of operations had to be filed 60 days prior to commencing the proposed activity. BLM also reminded him that the claims are located in a WSA and that, since he could not apparently establish a grandfather right or valid existing right, mining activities had to meet the nonimpairment standard. BLM cautioned that it would have to do an environmental assessment of any proposed activity as set out in the plan of operations and that any impairing activity could not be approved.

On May 9, 1986, Pene filed a notice or plan of operations. In a meeting that same day, BLM determined that a plan of operations was not then required under 43 CFR 3802.1-2. However, Pene was informed that any future changes from his present plans might require filing such a plan, and that he should keep BLM informed of his activities on the claims. BLM confirmed this by letter to Pene dated May 9, 1986.

On August 8, 1986, an operator leasing the claims from Pene filed a plan of operations proposing to strip mine the gravel bench on the Pussycat Nos. 1-4 above the Colorado River with a D-7 Caterpillar tractor. BLM's evaluation of the proposal was that it would not satisfy the nonimpairment criteria. BLM accordingly notified the operator on August 22, 1986, that it could not approve the plan.

By letter dated June 26, 1991, to the Utah State Office, Pene advised BLM:

> As per your request for notice, as indicated by the information that you sent me, I will be doing some testing, and production, on the Pussy Cat claims * * * this year. I will be doing this work at the old existing placer sites, the old mine tunnels, mine shaft, and the old open pit area. At this time any one operation will not exceed the five acre requirement. The equipment to be used will include a rubber tire loader, screening plant, and grader for road maintenance.

The State Office forwarded this letter to the Moab District Office on August 1, 1991, which returned the letter to Pene on August 13, 1991, advising that it required [illegible] before it could process his notice. It does not appear that Pene filed any additional information.

The case record shows that, on August 18, 20, and 25, 1992, during the course of field inspections, BLM agents discovered evidence that several surface disturbances of very recent origin had occurred on land within Pene's mining claims. In particular, they found that new dirt roads had been constructed, existing dirt roads had been extensively graded (using a tracked vehicle), and six new sampling pits had been dug (also using a tracked vehicle). The inspectors mapped and photographed the disturbances, summarizing their findings in memoranda that appear in the record.

In the October 5, 1992, decision under appeal, the Moab District Office sent Pene notice of noncompliance and of trespass for unauthorized land surface disturbances performed within the Westwater Canyon WSA. Specifically, BLM advised him that BLM staff members had found "that considerable blading of access routes had been done with a tracked vehicle; in addition, a number of freshly dug sampling pits were found." BLM also listed other land disturbances on the individual claims, including grading of 4-wheel drive roads, new road construction, and digging new sample pits. BLM also noted that Pene, in his affidavits of labor and improvement for the claims filed in the Grand County recorder's office, had stated under oath that he had sampled "from surface to bedrock," and conducted "road maintenance and repair (existing roads)."

BLM held that such work was not authorized and was therefore in violation of 43 CFR 3802.1-1. BLM found him to be in noncompliance with those regulations, pursuant to 43 CFR 3802.4-1. In addition, BLM found that he was "in trespass under 43 CFR 2801.3" and was, therefore, "liable for all costs incurred by the United States due to the investigation and termination of" that trespass. BLM also cautioned that he might "also be subject to criminal penalties." BLM ordered Pene to provide it with a written plan of operations detailing how he intended to rehabilitate and reclaim the lands (including restoring the land to its approximate original contour,

scarification, and reseeding) within 30 days of his receipt of its decision, and to notify BLM in advance of all reclamation work. BLM noted that failure to comply would constitute a record of noncompliance, which would in turn require a plan of operations for all future activity and a bond amounting to 100 percent of the estimated cost of reclamation. Pena appealed.

[1] The standard for managing a WSA during wilderness review is found in section 603(c) of FLPMA, 43 U.S.C. § 1782(c) (1988). The Secretary is expressly directed to "manage such lands according to his authority under this Act and other applicable law in a manner so as not to impair the suitability of such areas for preservation as wilderness." 43 U.S.C. § 1782(c) (1988). See generally Ralph E. Pray, 105 IBLA 44, 46 (1988); California Wilderness Coalition, 101 IBLA 18, 25 (1988). "Impairment of suitability for inclusion in the Wilderness System" is defined as causing such impacts "that cannot be reclaimed to the point of being substantially unnoticeable" by the time the Secretary is scheduled to make his recommendation as to the area's suitability for wilderness. 43 CFR 3802.0-5(d).

In furtherance of this directive, the Department has adopted Interim Management Policy and Guidelines for Lands Under Wilderness Review, (IMP) which are binding on all BLM state offices. See generally The Wilderness Society, 106 IBLA 46 (1988); L.C. Artman, 98 IBLA 164 (1987). 4/ These guidelines provide guidance to BLM employees in the management of WSA's pending ultimate Congressional determination regarding whether the study areas should be included in the permanent wilderness system. Oregon Natural Resources Council, 114 IBLA 163 (1990). The IMP provides specifically:

> [A]ny temporary impacts caused by the activity must, at a minimum, be capable of being reclaimed to a condition of being substantially unnoticeable in the wilderness study area (or inventory unit) as a whole by the time the Secretary of the Interior is scheduled to send his recommendation on that area to the President, and the operator will be required to reclaim the impacts to that standard by that date. [Emphasis supplied.]

44 FR 72022 (Dec. 12, 1979). The foregoing language was not altered in the amended IMP. See 48 FR 31854-56 (July 12, 1983).

It is well established that BLM may regulate the scope and manner of mining operations (including access) on a mining claim located after the

4/ The IMP was originally published at 44 FR 72014 (Dec. 12, 1979) and was thereafter amended at 48 FR 31854 (July 12, 1983). A Handbook for BLM was subsequently issued to make the IMP a part of BLM's directive management system. See H-8550-1. Citations in the text are to the Handbook page.

date of enactment of FLPMA (October 21, 1976) in order to prevent impairment of an area's wilderness suitability, pursuant to section 603(c) of FLPMA and its implementing regulations (43 CFR Subpart 3802). See State of Utah v. Andrus, 486 F. Supp. 995, 1007 (D. Utah 1979); Murray Perkins, 116 IBLA 288, 292-94 (1990); Eugene Mueller, 103 IBLA 308, 310-11 (1988). Appellant indicates that the Grand County Council had voted to exclude these lands from the wilderness, and also that there is proposed legislation pending that would eliminate the lands covered by his claims from the wilderness. Assuming these allegations are true, neither action affects the propriety of the decision under appeal. The final determination regarding the area's inclusion or noninclusion in the wilderness system lies with Congress, and the Department's duty to manage the lands consistent with the nonimpairment standard remains unchanged until Congress has acted. Unless and until the lands embraced by appellant's mining claims are removed from the wilderness, they must be managed under the nonimpairment standard mandated by statute. Robert L. Baldwin, Sr., 116 IBLA 84, 88 (1990); see also Manville Sales Corp., 102 IBLA 385, 392 (1988). The Grand County Council, not being the Congress of the United States, lacks authority to take such action; appellant does not show that any legislation excluding these lands has been signed into law.

Appellant contends that the existing roads that he admittedly maintained "may be county roads under R.S. 2477" and thus not subject to BLM's jurisdiction with respect to regulation of the use of the road bed (SOR at 5-6). 5/ It is unnecessary to resolve this question, as BLM's notice of noncompliance relies on more than the unauthorized maintenance of existing roads, i.e., the construction of new roads and the creation of new sampling pits with a tracked vehicle.

Appellant does not dispute the fact that he was required to obtain BLM's prior approval of a plan of operations or right-of-way for the construction of new roads on lands within the WSA. No such approval was obtained, despite BLM's warnings that it was necessary.

Nor could BLM properly have approved construction of new roads even if appellant had applied. Areas may be approved for wilderness status only if they are "roadless." Within the context of the wilderness inventory, the term "roadless" was defined as referring to the absence of roads which have been improved and maintained by mechanical means to ensure relatively regular and continuous use. See, e.g., Phelps Dodge Corp., 76 IBLA 31 (1983); C & K Petroleum Co., 59 IBLA 301 (1981). The IMP recognizes that rights-of-ways may be permitted within WSA's to the extent that they may be conformed to the nonimpairment criteria (see IMP at III.C.3.). However, the construction of a bladed road by mechanical tracked vehicles (such as those involved here) by definition constitutes impairment of the WSA

5/ On Oct. 16, 1995, Grand County, Utah, Road Supervisor, filed a letter confirming "Grand County's assertion of an RS 2477 road right-of-way claim to road #930 as shown" on an attached map.

and can only be permitted either as an incident of a valid existing right or under the "grandfathered uses" exception to the nonimpairment standard. See Southern Utah Wilderness Alliance, 125 IBLA 175, 181-82 n.3 (1993). Appellant's activities plainly do not fall within either exception.

Appellant strenuously denies that he ever constructed any new roads on that land, stating that he only maintained existing roads. BLM found, based on close field examination in August 1992, that new roads had been constructed. The BLM examiner based his conclusion that the roads had been recently constructed on several prior trips to the area, starting in 1988 and most recently in April 1992. The examiner photographed the new roads and mapped their location. 6/ They are depicted as spurs off of an existing road, often leading to new sampling pits. Appellant has submitted no evidence to the contrary. His assertions to that effect will not suffice to demonstrate that BLM was in error in its assessment that new roads were constructed. See L.C. Ahlem, 98 IBLA at 168.

Construction of mining access roads across lands under wilderness review using a tracked vehicle is a "mining operation." 43 CFR 3802.0-5(f). An approved plan of operations is required before such construction can commence within lands under wilderness review. 43 CFR 3802.1-1(a); see Paul M. Shock, 126 IBLA at 232, 235. Absent approval, such activity constitutes an act of noncompliance under 43 CFR 3802.4-1(b).

Appellant contends that he has been denied due process because BLM's decision was inadequate as a notice of noncompliance, as it did not specify how he had failed to comply with the Department's regulations, as required by 43 CFR 3802.4-1(c). Appellant argues that, although the decision stated that he had engaged in unauthorized surface disturbances, it did not specify why his work was unauthorized.

BLM's decision provided adequate notice of noncompliance. Departmental regulations provide that a notice of noncompliance "shall specify in what respects the operator * * * has failed to comply with * * * the provisions of applicable regulations." 43 CFR 3802.4-1(c). After detailing the work undertaken by appellant, BLM stated: "Such work was not authorized and is therefore in violation of 43 CFR 3802.1-1" (Decision at 2). This language clearly notified appellant that he had violated 43 CFR 3802.1-1 by engaging in specified work without prior BLM authorization. The cited regulation specifies when an approved plan of

6/ Some of the roads [illegible] new roads construction" on the examiner's maps were actually upgraded existing roads. That was amply clarified in his Aug. 27, 1992, memorandum, on page 2. Appellant has not controverted BLM's evidence clearly showing that his grading activities used a "tracked vehicle" (Examiner's Memorandum at 1, 1-2; Photographs A, B, F through H, K, and S (showing tread marks)).

operations is required, expressly including cases where "mining operations * * * involve construction of means of access * * * or improving or maintaining such access facilities in a way that alters the alignment, width, gradient size, or character of such facilities [or] * * * us[e] tracked vehicles or mechanized earth moving equipment, such as bulldozers or backhoes." 43 CFR 3802.1-1. Considered in connection with the cited regulation, BLM clearly specified how appellant had failed to comply with the cited regulation.

Appellant contends that BLM improperly charged him with unauthorized [illegible] because areas involved were "open," rather than "restricted," use areas under 43 CFR Subpart 8342, so that a plan of operations was not required for the operation of motorized vehicles, in accordance with 43 CFR 3802.1-2. Appellant bases his conclusion that the lands were "open use areas" on the fact that BLM had assertedly not followed procedures under 43 CFR 8342.2 for designating them "restricted use," including marking the area.

Departmental regulations specify those instances where conducting mining operations without BLM's approval of a plan of operations constitutes a violation. These include any operations involving the use of motorized vehicles over areas "other than open use areas and trails." 43 CFR 3802.1-1(d). Using motor vehicles over open use areas and trails without approval is not a violation, provided that the vehicles conform to the operating regulations and vehicle standards contained therein. See 43 CFR 3802.1-2(b). The term "open use areas and trails" refers to the areas and trails where there are no restrictions on off-road vehicle use. The regulations generally provide for the designation of all areas of the public lands as either open to use, open to limited use, or closed to use by off-road vehicles. See 43 CFR 8342.1. Roads are so designated via BLM's land-use planning process. See 43 CFR 8342.2(a) and (b). Following designation, BLM is required to "take action by marking and other appropriate measures to identify designated areas and trails so that the public will be aware of locations and limitations applicable thereto." 43 CFR 8342.2(c).

In the present case, there is no evidence that any of the public lands involved were designated "open use areas and trails" under 43 CFR Subpart 8342. In any event, appellant could not properly presume that they were open simply because they were not clearly marked either closed or open to limited use by off-road vehicles. Further, as discussed above, the regulations leave no room to doubt that operating a tracked motorized vehicle in connection with mining in a wilderness without prior approval is a violation.

Appellant also denies that he excavated any new pits on the land involved here, but states that he has only taken samples from pits that were in existence at the time he located his claims in 1984 (Notice of Appeal at 1; SOR at 3, 7). He further asserts that, whether or not new pits were dug, his activity consisted only of "[s]earching for and

occasionally removing mineral samples or specimens," and thus did not require prior BLM approval of a plan of operations under 43 CFR 3802.1-2.

BLM's Examiner found evidence of "freshly dug pits" (Memorandum at 1, 2, Attachments 1 and 2; Photographs I, J, O, and R). Although the examiner relied on his prior knowledge of the claims in determining that the diggings were new, appellant has failed to submit any rebuttal evidence. Further, in his affidavit of labor for the 1991-92 assessment year (filed with the Grand County Recorder on August 12, 1992), appellant had stated that he had sampled "from surface to bedrock." 1/ The examiner found that a tracked vehicle had been used to dig these pits (Memorandum at 1; Photographs I, J, and R).

The regulations, 43 CFR 3802.1-2, permit the expansion of existing and even the digging of new pits without prior BLM approval to the extent that it is necessary for the occasional removal of mineral samples and specimens. BLM had previously determined that no plan of operations was required even though sampling activity involved the digging of 3-foot long trenches, 1½ feet wide and ½ to 3 feet deep in various areas on the claims (EA at 2; see also July 23, 1984, Decision Record). Similar sampling activity was likewise found not to require a plan of operations in 1985 and 1986. However, the regulations clearly require approval of a plan of operations where, as here, they are undertaken with the use of tracked vehicles or mechanized earth moving equipment. 43 CFR 3802.1-1. Thus, we conclude that BLM properly found that appellant had committed an act of noncompliance.

Appellant contends that BLM's finding of noncompliance is flawed because it was based on an unreliable report, because the examiner was unqualified to judge whether appellant's activities were "out of compliance with mining laws, rules and regulations" and was biased (SOR at 7). Appellant's evidence of bias is based simply on the fact that the examiner "is a recreation technician" and thus "inherently biased against any activity which he views as affecting recreation." A claim of bias on the part of a Government agent must be based on personal interest rather than employment. See Nelson v. BLM, 125 IBLA 353, 360 (1993); United States v. Jones, 67 IBLA 225, 230 (1982); United States v. Zenukh, 9 IBLA 172 (1973). No showing of personal interest has been made here. As in other cases, unsupported allegations of bias are properly disregarded. See Converse v. Udall, 262 F. Supp. 583, 590 (D. Ore. 1966), aff'd, 399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969); United States v. Johnson, 39 IBLA 337, 347 (1979), aff'd in part and

1/ According to BLM, the placer deposits in this area, which consist of gravel and small rocks overlying gneiss and schists, are shallow, i.e., 0-6 feet deep (EA at 1).

rev'd in part, No. C-79-0486 (D. Utah June 17, 1981), appeals dismissed, Nos. 81-1808 and 81-1968 (10th Cir. Nov. 23, 1981).

Appellant contends that BLM improperly cited him for noncompliance under 43 CFR 3802.4-1(b) because his maintenance of existing roads and sampling of existing pits did not permanently impair the suitability of the land for designation as wilderness (SOR at 7-8). As proof of non-impairment, appellant notes that, in BLM's estimation, the "work that was done is reclaimable by merely seeding disturbed areas with native vegetation" (SOR at 8). Although appellant does not refer to those activities in connection with this assertion, we have determined that he also constructed new roads and used a tracked vehicle to create new pits within the WSA. BLM directed that reclamation of those activities include restoration to approximate original contour, scarification, and reseeding. Thus, BLM required much more than merely seeding disturbed areas.

A finding of noncompliance is properly justified where BLM finds that a mine operator has failed to comply with Departmental regulations and that "[such] noncompliance is causing impairment of wilderness suitability" (43 CFR 3802.4-1(b)). See also Paul M. Shock, 126 IBLA at 235. "Impairment of suitability for inclusion in the Wilderness System" is defined as causing such impacts "that cannot be reclaimed to the point of being substantially unnoticeable" by the time the Secretary is scheduled to make his recommendation as to the area's suitability for wilderness. 43 CFR 3802.0-5(d). "Substantially unnoticeable" is defined as "something that either is so insignificant as to be only a very minor feature of the overall area or is not distinctly recognizable by the average visitor as being manmade or man-caused because of age, weathering, or biological change." 43 CFR 3802.0-5(m); The City of St. George, 116 IBLA at 232 n.1; IMP, 44 FR at 72034. The record shows clearly that the actions taken by appellant were not substantially unnoticeable, and appellant has not shown otherwise.-8/

We, therefore, affirm BLM's determination that appellant's activities were impairing the suitability of the subject land for designation as wilderness. See Dave Paquin, 129 IBLA 76, 80 (1994); Paul M. Shock, 126 IBLA at 235-36; Murray Perkins, 116 IBLA at 295-96; Eugene Mueller, 103 IBLA at 311.

8/ We are aware that the activity in question occurred after Sept. 30, 1990, the date the Secretary had been scheduled to make his recommendation to the President. In these circumstances, the question becomes whether BLM may properly approve any activity that would render the land unsuitable as a wilderness, even temporarily. However, it is certain that BLM may require reclamation where, as here, the activity was clearly impairing to wilderness values and was unauthorized.

Appellant argues that BLM erred in requiring him to correct his act of noncompliance by submitting a plan to fully reclaim the existing roads, as this would preclude access to his mining claims and return the land to a condition different or better than it was prior to his maintenance activities (SOR at 7). We agree.

Under 43 CFR 3802.4-1(c), a notice of noncompliance "shall specify * * * the actions which shall be taken [by the mine operator] to correct the noncompliance." We do not interpret this regulation as authorizing BLM to require that a mine operator completely obliterate an existing road where his act of noncompliance consisted of improving and maintaining that road without prior BLM approval, as required by 43 CFR 3802.1-1. Rather, he is properly required only to "correct the noncompliance."

The noncompliance here was the improvement and maintenance of the road to the extent that it altered its character. Thus, BLM may properly require appellant to restore the character of the road only to that which existed prior to such activities. See Lloyd L. Jones, 127 IBLA 270, 275 (1993) (roads must be restored to "prior condition"). Therefore, BLM's October 1992 decision is reversed to the extent that it requires appellant to do more than return existing roads to their condition prior to his activities.

Finally, appellant challenges BLM's finding of trespass under 43 CFR 2801.3 (SOR at 8). Under 43 CFR 2801.3, a trespass occurs where there is any use of the public lands "that requires a right-of-way, temporary use permit, or other authorization pursuant to the regulations of [43 CFR Part 2800] and that has not been so authorized." 43 CFR 2801.3(a); See Bob Strickler, 106 IBLA 1, 7 (1988). We conclude that no authorization under Part 2800 was required here; instead, construction of new and improvement and maintenance of existing access roads was subject to approval as part of a plan of operations under the regulations of 43 CFR Subpart 3802. 43 CFR 3802.0-5(f), 3802.0-7(b), 3802.1-1, 3802.3-2(g), and 3802.4-2. Appellant was not required also to obtain authorization under the regulations of 43 CFR Part 2800. See Lloyd L. Jones, 127 IBLA at 273; Monch Mining Co., 75 IBLA 153, 161, 90 I.D. 382, 387 (1983). Thus, the failure to obtain approval could only result in a finding of noncompliance under 43 CFR 3802.4-1(b), and not also of trespass under 43 CFR 2801.3(a).

Therefore, we conclude that the Area Manager, in his October 1992 decision, properly cited appellant for failing to comply with BLM's regulations by constructing new and improving and maintaining existing roads and by creating new sampling pits, all on claimed lands within the Westwater Canyon WSA. To that extent, the decision is affirmed. It is also affirmed to the extent the Area Manager required appellant to fully

reclaim the new roads and pits. However, to the extent the Area Manager cited appellant for trespass and required him to fully reclaim the existing roads, the decision is reversed. 9/

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part and reversed in part.

David L. Hughes
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge

9/ Appellant, in recent months, has submitted numerous filings, some relating to BLM actions other than the October 1992 decision that is the sole subject of this appeal. These pleadings have been considered only in connection with the issues presented by the present appeal.